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No. 83-1916

In the Supreme Court of the United States

OCTOBER TERM, 1984

JARBOE-LACKEY FEEDLOTS, INC., PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in determining that "the position of the United States" was "substantially justified" so as to preclude an award of attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), the court of appeals correctly looked to the government's position in the lawsuit, rather than to its position in the agency proceedings and actions that led to the litigation.

2. Whether the court of appeals correctly held that the test for determining "substantial justification" under EAJA is one of "reasonableness," rather than "slightly more than reasonableness."

3. Whether the court of appeals correctly concluded that the district court did not abuse its discretion in refusing petitioner's proffer of additional evidence in support of petitioner's claim for attorneys' fees, when the district court already had a sufficient record before it to decide the issues.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 726 F.2d 1481. The oral rulings of the district court on the attorneys' fee issues raised in the petition have not been reported. The Appendix to the Petition contains only a portion of one of the two oral rulings (Pet. App. 99a-103a) and none of the other oral ruling; relevant portions of both of those rulings are noted in this brief. The district court's written orders are reproduced at Pet. App. 21a-22a. The opinion of the district court in the underlying litigation (Pet. App. 23a-89a) is reported at 516 F. Supp. 321.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1984. A petition for rehearing was denied on February 23, 1984 (Pet. App. 90a-91a). The petition for a

writ of certiorari was filed on May 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

1. For many years, ranchers and feed-lot operators administered the chemical diethylstilbestrol (DES) to beef cattle, in feed or as an implant, to help the cattle gain weight faster with less feed. By 1966, it was recognized that DES causes cancer. See *Bell* v. *Goddard,* 366 F.2d 177, 179-181 (7th Cir. 1966). In 1979, based upon new scientific evidence that the use of DES leaves potentially carcinogenic residues in edible portions of meat, and after lengthy rulemaking proceedings, the Food and Drug Administration withdrew its approval of the use of DES in feed and implants. 44 Fed. Reg. 54852 (1979). The FDA's order was upheld in *Rhone-Poulenc, Inc.* v. *FDA,* 636 F.2d 750 (D.C. Cir. 1980). At the request of ranchers and feed-lot operators, including petitioner, the FDA twice extended the date on which the DES ban was to take effect; however, in August 1979 the feeding or implanting of DES was finally prohibited, effective November 1, 1979 (see Pet. App. 2a).

On April 17, 1980, a United States Department of Agriculture inspector at a Kansas slaughterhouse discovered recently-implanted (*i.e.*, post-November 1, 1979) DES pellets in the ears of slaughtered cattle owned by petitioner; USDA then retained 273 of petitioner's beef carcasses in the slaughterhouse (Pet. App. 2a-3a). Some of the ears of these carcasses were tested, and all the tested ears were found to contain enough DES to leave a residue in the meat (*id.* at 3a). In May 1980, the United States filed a seizure action against the meat in the United States District Court for the District of Kansas; the government charged that the meat was "adulterated" within the meaning of the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, because it contained DES residue.

2. The case was tried to the district court. At the close of the government's case, the district court denied petitioner's motion for a directed verdict, stating that the government had presented "not just a prima facie case but * * * clear and convincing evidence, overwhelming evidence, as I see it * * * that that beef is adulterated; that it may possibly injure someone in this country or across this country." 25 R. 20-21. After the conclusion of trial and a six-month period of reflection, however, the court held that the United States had not carried its burden of proving adulteration and dismissed the libel (Pet. App. 21a-89a). In order to prevail in the action, the government had to prove that: (1) DES is a "poisonous or deleterious" substance within the meaning of the Federal Meat Inspection Act; (2) the seized meat contained DES; and (3) the presence of DES in the meat "may render it injurious to health." 21 U.S.C. 601(m). The district court found that DES causes cancer (and thus is a "deleterious substance") (Pet. App. 29a-30a), and that the seized meat contained DES implanted after November 1, 1979 (*id.* at 30a, 46a-47a). But the district court also ruled that the government had failed to prove that the quantities

of DES in petitioner's meat alone would be injurious to the public, especially in light of the anticipated effects of the ban on using DES in the future (*id.* at 31a, 64a, 69a).

3. After the United States decided not to pursue an appeal, petitioner requested attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(b) and (d), claiming that the government's position was not "substantially justified" and that the government had acted in bad faith. Following briefing and oral argument, the district court denied petitioner's request for attorneys' fees. The court specifically found that the government's position was reasonable — and thus substantially justified — and that there was no evidence that the government had acted in bad faith (Pet. App. 100a-101a). Indeed, the court ruled that in light of the known carcinogenic effects of DES, the existence of the DES ban, and the clear presence of recent DES implants in the seized carcasses, "the Government had every right, *if not the duty,* to proceed with the seizure action" (*id.* at 101a (emphasis added)).[1] Finally, the district court declined petitioner's request to hold an evidentiary hearing concerning certain allegedly "newly discovered evidence" adduced by petitioner. The court concluded that the matters raised by petitioner had been fully aired at trial. 2/8/82 Tr. 120, 122-124; 3/5/82 Tr. 24-25.

4. The court of appeals affirmed in all respects (Pet. App. 1a-20a). The court first noted the narrow scope of appellate review of applications for attorneys' fees pursuant to EAJA (*id.* at 8a-9a). The court then observed that "[t]he law is clear that the test of substantial justification is essentially one of reasonableness in both law and fact" (*id.* at 9a

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[1]The district court also observed, with its experience of the trial in mind, that this was "a classic case * * * that had to be tried" in order to resolve the bitter scientific dispute concerning the effect of DES in the seized meat. 2/8/82 Tr. 117.

(footnote omitted)). The court next turned to the issue of which government position — the litigation position, the underlying agency action, or both — must be "substantially justified" in order to preclude an award of attorneys' fees to a prevailing party. The court observed that ordinarily it will make no difference which position is considered (*id.* at 11a), but the court resolved any question about the matter in this case by holding that "the position of the United States" means "the arguments relied upon by the government in litigation" (*ibid.*). The court then concluded that the district court correctly found that the government's litigation position in this case was substantially justified (*id.* at 11a-13a).

The court of appeals also held that the district court did not abuse its discretion in finding that there was " 'no evidence that the government acted in bad faith in either the filing or preparation of this case' " (Pet. App. 14a). Finally, the court of appeals ruled that the district court did not abuse its discretion in refusing to take additional evidence on the issues of substantial justification and bad faith. Observing that an evidentiary hearing might be appropriate when the district court is not otherwise in a position to make findings concerning bad faith, the court of appeals held that the district court here was able to make such findings on the basis of the record already before it (*id.* at 15a). Similarly, the district court gave the parties "ample opportunity to brief and to argue the EAJA issue, including an opportunity to submit pertinent affidavits," and thus did not abuse its discretion in declining petitioner's proffer of additional evidence (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. While there arguably is a conflict in the circuits on the first question presented, that issue does not warrant this Court's review because resolution of the conflict here would not affect the

result in this case and because Congress is in the process of legislating a resolution of the conflict.[2] Nor do the other questions presented warrant review by this Court.

1. a. The court of appeals held that the "position of the United States" that must be substantially justified under EAJA is its litigation position, rather than the underlying agency action that led to the litigation (Pet. App. 11a). As the District of Columbia Circuit recently observed, neither the statutory language nor the legislative history of EAJA clearly defines which "position" is the one on which the statute is focused. *Spencer* v. *NLRB*, 712 F.2d 539, 547-549 (1983), cert. denied, No. 83-981 (Apr. 16, 1984). Nevertheless, the "normal meaning" of the text of Section 2412(d)(1)(A) suggests that "the position of the United States refers to the government's position in court and not before [the agency]." *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387, 1390 (Fed. Cir. 1982). As the Federal Circuit explained (*ibid.* (brackets in original)):

> The Act provides for the awarding against the United States of attorney's fees "incurred by [the prevailing] party in any civil action . . . in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified." A fair and reasonable reading of those words is that the position referred to is that taken by the United States in the "civil action" in which the attorney's fees were "incurred." The provision addresses the award of attorney's fees in a civil action in court, and it is in that particular action in which the government takes a position.

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[2]The Court recently declined to review the decision upon which the court of appeals here relied (see Pet. App. 11a) in deciding the same issue. *Spencer* v. *NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, No. 83-981 (Apr. 16, 1984).

Moreover, although Section 2412(d)(1)(A) does not expressly specify whether courts are to look to the government's litigation position or to its position in the underlying administrative proceedings, other sections of EAJA shed light on the issue. Thus, the statute provides that, in awarding fees to a prevailing party in an action for judicial review of an adversarial agency adjudication, the court shall include in that award fees and expenses incurred in the course of litigation before the agency unless the court finds "that *during such adversary adjudication,* the position of the United States was substantially justified" (28 U.S.C. 2412(d)(3) (emphasis added)). As the court of appeals reasoned in *Spencer,* 712 F.2d at 547-548 (footnote omitted):

> [T]he highlighted language indicates * * * that the government's "position," for the purpose of assessing its liability for attorneys' fees resulting from administrative adjudication, is the stance it adopted in litigation before the agency. It remains possible * * * that the phrase "position of the United States" was intended to have a different meaning when used in the context of litigation before the courts, but if Congress contemplated such a difference, it failed to indicate as much in the statute. In short, the unequivocal adoption of the "litigation position" theory in section 2412(d)(3) suggests that the identical phrase, when used without qualification in section 2412(d)(1)(A), should be interpreted as the posture adopted by the government before the court.

Accord, *Broad Avenue Laundry & Tailoring,* 693 F.2d at 1390-1391; *Tyler Business Services, Inc.* v. *NLRB,* 695 F.2d 73, 75-76 (4th Cir. 1982).

b. While we thus believe that the rule adopted by the court of appeals in this case best comports with the statutory language, it is important to note, as the court of appeals

itself recognized (Pet. App. 11a), that the issue petitioner asks this Court to decide is of little practical importance. See also *Spencer*, 712 F.2d at 552. In all but a few cases, the government's "litigation position" is simply a presentation or defense of the underlying agency action that precipitated the court proceeding; accordingly, a claimant's entitlement to attorneys' fees ordinarily will not be affected by any distinction between what the *Spencer* court called the "litigation position" theory and the "underlying action" theory (*ibid.*).[3]

Petitioner has not explained how — or whether — the rule it seeks would have changed the outcome here. There is good reason for this reticence. While petitioner has not specified which pre-litigation agency position it wishes to have considered on the "substantial justification" issue, the seizure of petitioner's beef — and thus this litigation — grew out of the FDA's ban on DES implants in cattle effective November 1, 1979. The agency order imposing that ban was affirmed by the District of Columbia Circuit prior to the district court's decision below (see page 2, *supra*). In these circumstances, the government's "position" surely was substantially justified, whether one considers its pre-litigation actions concerning DES or its decision to litigate this case.[4]

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[3]For this reason, some courts have found it unnecessary to resolve the issue presented by petitioner. See, *e.g.*, *Walls* v. *Mississippi State Dep't of Public Welfare*, 730 F.2d 306, 326 (5th Cir. 1984); *Premachandra* v. *Mitts*, 727 F.2d 717, 730 n.17 (8th Cir. 1984).

[4]The central objective of EAJA, as explained in the preamble to the statute (5 U.S.C. 504 note), is to enable private parties to challenge unreasonable or oppressive governmental action by diminishing the deterrent effect of incurring large litigation expenses. At the same time, however, Congress did not wish to inhibit the government's legitimate efforts to enforce the law and sought to avoid imposing potentially huge costs on the federal treasury. Accordingly, Congress declined to enact a provision for the automatic award of attorneys' fees to private parties

In addition, it is not clear how the "position of the United States" could be anything but its litigation position in a government seizure action such as this one. This is not a case in which petitioner brought suit against the government to challenge an administrative ruling or other agency action. Rather, the "agency action" on which petitioner seems to focus is the government's decision to initiate this seizure action in federal district court; petitioner apparently contends that that decision was unreasonable because the government theretofore had permitted the use of DES for many years. See Pet. 3-4. But the decision to initiate litigation is part and parcel of the litigation itself. Accordingly, this is an inappropriate case for this Court to consider whether "the position of the United States" should be other than the government's litigation position.

c. The rule adopted by the court below is also the rule in four other circuits. *Boudin* v. *Thomas*, 732 F.2d 1107, 1115 (2d Cir. 1984); *Spencer* v. *NLRB*, *supra*; *Tyler Business Services, Inc.* v. *NLRB*, *supra*; *Broad Avenue Laundry & Tailoring* v. *United States*, *supra*. Petitioner contends that this rule conflicts with that adopted by the Third Circuit in *NRDC* v. *EPA*, 703 F.2d 700 (1983), and the Ninth Circuit in *Rawlings* v. *Heckler*, 725 F.2d 1192 (1984), in which those courts examined the agency's underlying action as part of "the position of the United States." In fact, however, the Third Circuit's decision does not present a sufficiently clear-cut conflict with the decision of the court below to

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who prevailed in suits against the government. See S. Rep. 96-253, 96th Cong., 1st Sess. 6 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980). Instead, Congress selected an intermediate position designed to balance "the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." H.R. Rep. 96-1418, *supra*, at 10; S. Rep. 96-253, *supra*, at 6.

warrant this Court's review, and the Ninth Circuit's decision is factually distinguishable.[5]

d. Finally, it is especially significant that Congress is aware of the issue raised by petitioner and is actively considering legislation that would define "position of the United States" in the statute itself. Section 2412(d) of EAJA was enacted as a three-year experiment, and it will automatically expire on October 1, 1984, unless extended by Congress. 28 U.S.C. 2412 note. The Senate bill to extend the Act is S. 919, 98th Cong., 1st Sess. (1983). Since it was introduced in March 1983, S. 919 has been modified to address a number of issues that have arisen in the administration of the statute during its experimental period. Among other things, the current version of the bill provides that the " 'position of the United States' includes the underlying agency action which led to the litigation, however fees and expenses shall not be awarded against the United States in

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[5]In *NRDC* v. *EPA*, each panel member wrote a separate opinion, each expressing different views on the meaning of "position of the United States." While the views of Judges Gibbons and Thompson, taken together, are at odds with the decision below, the absence of an opinion for the court makes the position of the Third Circuit somewhat unclear. See *Boudin* v. *Thomas*, 732 F.2d at 1115. Review by this Court should await a more definitive statement from the Third Circuit about the rule it intends to follow.

In *Rawlings* v. *Heckler*, the Ninth Circuit held that it would consider the "totality of the circumstances prelitigation and during trial" (725 F.2d at 1196). In deciding to award fees, however, the *Rawlings* court stressed that the government had taken an entire year to settle the lawsuit (*ibid.*). The instant case did not involve a settlement, but in *Spencer* v. *NLRB*, upon which the court below relied in resolving the "position of the United States" issue, the court suggested that the government might well be liable for attorneys' fees on facts like those in *Rawlings*, "regardless of which theory is applied." *Spencer*, 712 F.2d at 555-556 & n.58.

defending a litigation position after the date such formal position has become substantially justified." The Senate Judiciary Committee has voted to report the version of S. 919 containing the definition of "position of the United States" just quoted. The House Judiciary Committee also has voted to report a bill to extend the Act (H.R. 5479, 98th Cong., 2d Sess. (1984)). Section 2(b) of H.R. 5479 provides that " 'position of the United States' includes, but is not limited to, the actions and omissions of an agency which led to the litigation."

Because of the "sunset" provision contained in the current statute, it is reasonable to assume that Congress will in fact take action on the pending bills before October 1, 1984.[6] Thus, by the start of this Court's next Term, Congress either will have allowed the Act to expire or reauthorized it in a form that may well include a statutory definition of "position of the United States." In either event, the correct interpretation of the current statute would have become a matter of extremely limited importance.[7] In these

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[6]Petitioner notes (Pet. 10 n.4) that the pending legislation "has support from Republicans, Democrats and the Administration and is virtually certain to be enacted." We agree that petitioner's prediction is probably correct, but strongly disagree, for the reasons noted in text, that the likelihood of passage supports this Court's exercise of certiorari jurisdiction; on the contrary, it appears to make review totally unnecessary.

[7]Petitioner cites (Pet. 13 n.9) some recent remarks of Representative Kastenmeier in support of its interpretation of "position of the United States." But "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974). If Congress as a whole shares Representative Kastenmeier's views, then it will include an appropriate amendment in the pending EAJA legislation.

circumstances, we suggest that the Court should defer to Congress.[8]

2. Petitioner next contends that the Court should grant review in order to decide whether, "[t]o be substantially justified, the government's position must be more than merely reasonable" (Pet. 15). As the court of appeals recognized, however, "[t]he law is clear that the test of substantial justification is essentially one of reasonableness in both law and fact" (Pet. App. 9a (footnote omitted)). Common sense belies the notion that Congress could have intended to make the United States pay attorneys' fees for taking "reasonable" positions. Moreover, the court's ruling is consistent with the House Report on EAJA (the test "is essentially one of reasonableness," H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980)), and with the decisions of ten other courts of appeals.[9] In addition, it was accepted by petitioner itself in

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[8]In the event that Congress extends the Act but fails to legislate a solution to the conflict asserted by petitioner, there will be time enough for this Court to resolve the matter in a subsequent case. In the meantime, only a minority of cases are affected by the issue on which petitioner seeks review, and this is not one of them. See pages 7-9 & note 3, *supra*.

[9]*Boudin* v. *Thomas*, 732 F.2d at 1115; *Dougherty* v. *Lehman*, 711 F.2d 555, 563-564 (3d Cir. 1983); *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d at 75; *S & H Riggers & Erectors, Inc.* v. *OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982); *Wyandotte Savings Bank* v. *NLRB*, 682 F.2d 119, 120 (6th Cir. 1982); *Foley Constr. Co.* v. *United States Army Corps of Engineers*, 716 F.2d 1202, 1204 (8th Cir. 1983), cert. denied, No. 83-998 (Apr. 16, 1984); *Rawlings* v. *Heckler*, 725 F.2d at 1196; *Matthews* v. *United States*, 713 F.2d 677, 683 (11th Cir. 1983); *Morris Mechanical Enterprises, Inc.* v. *United States*, 728 F.2d 497, 499 (Fed. Cir. 1984). One panel of the Seventh Circuit has explicitly adopted the "reasonableness" standard, *Berman* v. *Schweiker*, 713 F.2d 1290, 1293 (1983), while another panel of that court has adopted essentially that standard by observing that "substantially justified" means that the government had a "solid legal claim or defense." *McDonald* v. *Schweiker*, 726 F.2d 311, 316 (1983).

the district court and the court of appeals.[10] Only one court of appeals has concluded that the test for "substantial justification" is "slightly more stringent" than one of reasonableness.[11]

In any event, as even petitioner concedes (Pet. 16), the distinction between "reasonable" and "slightly more than reasonable" "may seem relatively minor at first glance * * *." Indeed, to our knowledge, no case has ever turned on this semantic quibble, and petitioner has not explained how adoption of its preferred standard would have changed the result in this case.[12] Petitioner also speculates (Pet. 16) that the aggregate amount of attorneys' fees awarded pursuant to EAJA since its enactment has been lower than projected "in part" because of the courts' application of the reasonableness standard. If Congress shares petitioner's concern on this point, it presumably will include an appropriate amendment in the pending EAJA legislation; at present, however, neither the Senate bill nor the House bill would revise the reasonableness standard. Accordingly, there is no reason for this Court to consider the issue.

3. Finally, petitioner seeks review of the court of appeals' ruling that the district court did not abuse its discretion in declining petitioner's proffer of certain additional evidence

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[10]See 2/8/82 Tr. 84 ("[S]ubstantial justification" means that "[t]here must be a reasonable basis in law and in fact."); Appellant's Br. 22-23.

[11]*Spencer* v. *NLRB*, 712 F.2d at 558. This issue was not presented by the petition for a writ of certiorari in that case.

[12]Petitioner argues (Pet. 17-18) that "[h]owever difficult it is to think of the government's [position] as 'reasonable,' it is impossible to characterize that illegal seizure as *more* than reasonable." This argument does not explain how the two phrasings would yield different results in this case. Moreover, petitioner does not explain how a court is to distinguish between government positions that are "reasonable" and those that are "slightly more than reasonable." The difficulty in making such hair-splitting distinctions counsels strongly against adoption of petitioner's view of the statute.

on the issues of bad faith and substantial justification. This fact-bound question about an exercise of judicial discretion was correctly decided below and does not warrant review by this Court.

Contrary to petitioner's assertion (Pet. 18), there is no conflict in the circuits on this point. In the case on which petitioner relies, *McQuiston* v. *Marsh*, 707 F.2d 1082 (9th Cir. 1983), the court of appeals required the district court to conduct an evidentiary hearing with respect to the government's alleged bad faith where the district court failed to make any findings on the issue. In contrast, the district court here was able, based on the lengthy litigation and numerous briefs filed on the issue (see Pet. App. 15a), to make an explicit finding that the government did not act in bad faith. Indeed, petitioner no longer challenges that finding to the extent that it was relied upon to deny attorneys' fees under 28 U.S.C. 2412(b), which codifies the "bad faith" exception to the American Rule against fee-shifting and makes it applicable to the United States (see Pet. 9 n.3). Instead, petitioner apparently seeks to introduce further evidence of the government's alleged bad faith in support of its claim for fees under 28 U.S.C. 2412(d). But having abandoned its claim for fees under the provision of EAJA expressly directed at bad faith, petitioner should not be permitted to revive that claim through the "back door" of Section 2412(d).

In any event, the court of appeals' conclusion that no further evidence was required to be taken here was based on the trial judge's intimate familiarity with the issues acquired during trial and on the "ample opportunity" afforded to the parties to brief and to argue the attorneys' fee issues. See Pet. App. 15a. And petitioner's assertion (Pet. 18) that it sought to proffer to the district court a privileged memorandum (see Pet. App. 104a-109a) prepared by a government attorney containing his pre-trial views on the lawsuit

is wholly unsupported by the record. Petitioner never identified that document — explicitly or vaguely — to the district court as possibly probative evidence. Indeed, petitioner did not seek to have the courts below consider the document until it attached the memorandum to its petition for rehearing in the court of appeals. As for the other evidence of alleged bad faith that petitioner attempted to proffer in the district court, the court observed, after sitting through a lengthy trial in which the merits of the government's position were discussed in detail, and after reading briefs and hearing oral argument on much of the same material during the attorneys' fee proceedings, "I have heard all of this and I don't need to hear any more" (2/8/82 Tr. 120). Under the circumstances of this case, such an exercise of discretion and common sense by the trial judge does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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